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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B4

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 07 165 51602

Date:

MAY 15 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Florida corporation, is described as a "diversified business development and investment firm." It seeks to employ the beneficiary as its merchandising director.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director abused his discretion by using the size of the organization as the sole factor in considering whether the beneficiary will be performing primarily managerial or executive duties. Counsel asserts that the director instead should have considered the beneficiary's actual duties, and contends that such duties clearly establish the executive nature of the proffered position. Counsel submits a brief in support of the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the immigrant visa petition on May 14, 2007. The petitioner indicated on Form I-140 that the beneficiary would be employed as merchandising director of the U.S. company, which, according to the information provided on Form I-140, has eight employees. In a letter dated May 7, 2007, the petitioner indicated that the company has been engaged since 2005 in acquiring franchise rights, building stores, hiring employees and "opening and operating the franchised units as a master 'MANGO' franchisee in California and Nevada." The petitioner indicated that the company has opened four Mango stores in California and Nevada since May 2006, with a fifth store scheduled to open in November 2007.

The petitioner stated that the beneficiary's duties as merchandising director are as follows:

She holds responsibility for identifying in season product opportunities and participates in priority meetings to ensure product, account and corporate goals are maximized and aligned with our resources. She determines production selection and quality. She also ensures that [the petitioner] meets its obligation under franchise agreements and maintains a strong business relationship with the franchisor. Finally, she oversees the development of corporate goals and objectives as they relate to the merchandising of our products in our various stores.

Although the petitioner stated on Form I-140 that it has eight employees, the petitioner provided a copy of its payroll summary for April 2007, which identifies only five workers, including the beneficiary.

The director issued a request for additional evidence (RFE) on January 3, 2008, in which he advised the petitioner that the evidence submitted to show that the beneficiary will be employed in the United States as a multinational manager or executive was not sufficient. The director instructed the petitioner to submit, inter alia: (1) a statement describing the intended employment, including information concerning specific job duties, types of employees supervised, and level of authority; (2) documentation substantiating the need for a merchandising director within the scope of the petitioner's eight-person business; (3) detailed position descriptions for all employees, including specific duties performed and percentage of time spent on each duty; (4) an organizational chart showing the beneficiary's position in relation to others in the company; and (5) a list of all functions performed by the beneficiary, the day-to-day tasks performed, and the time spent on each duty.

In a letter dated March 25, 2008, the petitioner provided the following description of the beneficiary's duties:

- Identifying product opportunities and participates in priority meetings to ensure product, account and corporate goals are maximized and aligned with our resources.
- She determines product selection and quality. She oversees the development of corporate goals and objectives as they related to the merchandising of our products in various stores.
- She is instrumental in directing the Merchandising for our new venture, "Letters of Marque," a luxury lingerie product line;
- She oversees the product lines, recommends merchandising strategies for said products, determines our selection of suppliers and manufacturers and as a result, travels extensively throughout Europe;
- Establish and implement departmental policies, goals, objectives and procedures, conferring with board members and staff members as necessary.
- Determine staffing requirements and interview, hire and oversee existing personnel;
- Direct and coordinate the departmental budget to fund the operations, maximize investments and increase efficiency;
- Determine goods and services to be sold, set prices and credit terms, budgeting and accounting based on forecasts of customer demand.
- Oversees the sales and marketing division and the employees within each department.
- Reports directly to the CEO.

The petitioner submitted an organizational chart which indicates that the beneficiary, as merchandising director, supervises a designer and sales employee, a public relations/marketing employee, and an accounting employee, as well as the chief executive officer of Letters of Marque. The chart indicates that the beneficiary reports directly to the petitioner's president. The chart also depicts a vice president and a chief operating officer whose positions are shown as lateral to the beneficiary's.

In a letter dated March 25, 2008, counsel for the petitioner further explained the petitioner's need for the beneficiary's services:

The firm requires a Merchandising Director as we have rolled out a brand luxury lingerie product line, Letters of Marques, which includes the development of websites, product placement in select boutiques nationwide as well as participation in upscale lingerie shows worldwide, London, Paris, Tokyo and throughout the United States. . . .

The Merchandising Director insures product placement in upscale magazines including W magazine and Glamour. Finally, the Merchandising Director was responsible for securing the endorsement of the famous actress Stacy Dash, as the spokeswoman for this product. Irrespective of the number of employees in the firm, the objective for the company is to develop a large scale product brand and cannot do so without the leadership and vision of [the beneficiary].

With respect to the beneficiary's claimed subordinates, the petitioner stated that the designer and sales employee "translates merchandising and design plans and liaises with merchandising director to ensure sales occur in her absence." The petitioner indicated that the public relations and marketing employee "translates PR plans and strategies assisting in local implementation i.e., local press and day to day marketing." The petitioner indicated that the accounting employee "follows up with all incomings and outgoing with both suppliers and customers," and "enforces the budget the merchandising director has approved." Finally, the petitioner stated that the chief executive officer of Letters of Marque, [REDACTED], "works side by side the merchandising director to ensure brands visibility and profile stays intact," attends meetings with the vice president and merchandising director, and "acts as the face of the brand."

The AAO notes that the record of proceeding also contains the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for the years 2006 and 2007. In 2006, the petitioner reported gross receipts or sales of \$1,841,030 and assets of \$3,045,994. On an attached Form 4797, Sale of Business Property, the petitioner reported the sale of "stores" acquired on "various dates," on December 31, 2006.

On the 2007 Form 1120, the petitioner reported gross receipts or sales of \$100 and total assets of \$25,902. The petitioner also reported capital gain net income of \$668,143. According to the petitioner's Form 4797 for 2007, the company sold its remaining store or stores on February 5, 2007 at a profit of \$668,143.

Finally, the petitioner submitted monthly profit and loss statements for the first three months of 2008. The only income reported in each month is from "sale of stores." The AAO notes that, in March 2008, the petitioner paid no rent or payroll expenses.

The director denied the petition on May 5, 2008, concluding that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition the director cited the petitioner's relatively low number of employees as one factor in determining that she would not be performing primarily managerial or executive duties. The director also observed that "the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing," and therefore found the evidence insufficient to establish that her duties would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner objects to the director's finding that the petitioner did not adequately describe the beneficiary's job duties, and contends that the director placed undue emphasis on the size of the petitioning company. Counsel asserts "the fact the Director based his conclusion that the position could not be executive because of the 'limited staffing' of the respondent's company conflicts with the Congressional intent to avoid unfair discrimination against small businesses." Counsel emphasizes that the regulations do not impose any requirements as to the minimum number of employees supervised. Counsel asserts that the job descriptions submitted in response to the request for evidence, the petitioner's organizational chart, and the duties performed by the beneficiary's subordinates, were never considered by the director.

Counsel asserts that, regardless of the number of employees the petitioner employs, the beneficiary is responsible for managing the merchandising division, a major component of the company, and is employed in an executive capacity.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

As a preliminary point, the AAO stresses that, in this proceeding, the petitioner must establish that the petitioner and beneficiary were eligible for the benefit sought at the time the instant petition was filed on May 14, 2007. A petitioner must establish eligibility at the time of filing; the petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

At the time of filing the petition on May 14, 2007, the petitioner stated that the beneficiary identifies "in season product opportunities," participates in "priority meetings to ensure product, account and corporate goals are maximized," "determines product selection and quality," and "ensures that [the petitioner] meets its obligations under franchise agreements and maintains a strong business relationship with the franchisor." The

petitioner indicated that it was operating four franchised "Mango" stores and preparing to open a fifth store within a few months' time. The AAO would not disagree that a company operating a chain of four to five retail stores may reasonably require a managerial employee to oversee the merchandising function.

There is no corroborating evidence, however, to support the petitioner's claim that it was in fact operating four retail stores at the time the petition was filed. In fact, according to the petitioner's tax returns, the company sold all of its stores between December 2006 and February 2007, and had sales income of only \$100 in 2007. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Absent evidence that the petitioner actually had ongoing sales operations and products to merchandise at the time of filing, the initial position description is not credible.

While the petitioner submitted a lengthier position description in response to the RFE, the majority of the duties are described in reference to the petitioner's "new venture," a lingerie product line. The petitioner has not described or documented the nature of its relationship with "Letters of Marque," and there is nothing in the record to suggest that such relationship existed at the time the petition was filed. Again, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. The record does not establish that the petitioner was engaged in the sales or merchandising of any product lines at the time the petition was filed, at any point in 2007, or during the first three months of 2008. Therefore, the duties listed in the petitioner's response to the RFE appear to be speculative in nature, at best.

Moreover, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. When examining the managerial or executive capacity of a beneficiary, USCIS reviews descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

At the time of filing, the petitioner claimed to employ a total of eight employees. According to the company's payroll records, the number of employees as of April 2007, the month preceding the filing of the petition, was actually five, including the beneficiary. The company's sales revenue dropped from \$1.8 million in 2006 to \$100 in 2007. In the first quarter of 2008, the petitioner continued to report no sales revenue other than residual income from the sale of its stores. According to the petitioner's profit and loss reports, the petitioner did not pay any salaries or wages in March 2008, the month in which the petitioner submitted its organizational chart. Therefore, the claim that the company continuously employed eight workers, including three employees who were reporting to the beneficiary, is not persuasive. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the record, the AAO cannot determine the scope or nature of the petitioner's operations as of the date of filing, or the nature of the beneficiary's duties within the context of the business.

On appeal, counsel contends that the director placed undue emphasis on the size of the petitioning company in determining that the beneficiary will not be employed in a primarily managerial or executive capacity. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, an executive's duties must be the critical factor. However, if USCIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). In addition, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As discussed above, the evidence of record does not support a finding that the petitioner was operating four retail stores, or any retail stores at the time of filing, notwithstanding the petitioner's claims. While the record shows that the company did in fact continue to pay salaries in the amount of \$282,000 in 2007, the AAO will not speculate as to what the employees were doing in order to generate \$100 in revenue for the entire year. The company appears to have changed or to be in the process of changing its entire line of business, but has not submitted evidence that it has begun generating any revenue from the new lingerie product line, or submitted any documentary evidence of its business relationship with "Letters of Marque." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In light of the evidence in the record, the AAO is not persuaded that a company which had no retail stores to stock or product line to promote at the time of filing had a reasonable need for a merchandising director to perform the described duties.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity that employed the beneficiary prior to her transfer to the United States in 2007. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign

office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The record shows that the petitioner is a Florida corporation established on July 25, 2001. The petitioner submitted a Certificate of Qualification as evidence that the company was authorized to conduct business in California on June 16, 2004. The petitioner claims to be a wholly owned subsidiary of Neotek Kimya Sanayi Ve Ticaret A.S., a Turkish company.

In the RFE, the director requested documentary evidence to establish the qualifying relationship between the U.S. and Turkish entities. In response, the petitioner submitted a copy of its stock certificate number one, issuing 100,000 shares of stock to the foreign entity on June 3, 2004. The petitioner did not submit a copy of its stock transfer ledger, or explain why it did not issue stock when the company was first established in 2001. Based on the petitioner's statements in its letter dated May 7, 2007, the company was established in Florida for the purpose of developing and managing commercial and residential properties in that state.¹ This inconsistency has not been explained.

As noted above, the record of proceeding also includes the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for the years 2006 and 2007. On both forms, the petitioner indicated at Schedule K that no foreign person or entity owns at least 25 percent of its stock. This information directly contradicts the petitioner's claim that it is wholly owned by the Turkish corporation. Furthermore, according to the submitted

¹ USCIS records indicate that the petitioner filed at least three L-1 nonimmigrant petitions in 2002 and 2003 using a Florida address. (See SRC 03 002 50579, SRC 03 002 52930 and SRC 04 006 53099). It is evident that the petitioner did not establish the requisite qualifying relationship in these nonimmigrant proceedings by submitting a copy of a stock certificate issued in 2004.

stock certificate number one, the petitioner issued 100,000 shares of stock to the foreign entity with par value of \$1.00 per share. According to the Schedule L of the petitioner's Forms 1120, the value of its common stock is only \$100.

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Based on the unexplained inconsistencies in the record with respect to the ownership of the U.S. company, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the petition will be denied.

Another issue not addressed by the director is whether the petitioner submitted evidence that the U.S. company had been doing business for at least one year at the time the petition was filed on May 14, 2007, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

As discussed above, the petitioner, while clearly active throughout 2006, appears to have sold the last of its retail stores more than three months prior to the filing of the instant petition. The company generated only \$100 in sales revenue in 2007. While it appears that the company may continue to have some residual income as a result of the sale of its stores, it has not documented that it was engaged in the regular, systematic and continuous provision of goods and/or services in 2007 and has not documented a full year of qualifying business activities between May 2006 and May 2007. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO acknowledges that the petitioner employed the beneficiary as an L-1A nonimmigrant at the time the petition was filed. The AAO acknowledges that both the instant immigrant and the L-1A nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity and on similar definitions of qualifying relationship/organization. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44) and 8 C.F.R. § 204.5(j)(2) and 8 C.F.R. § 214.2(l)(1)(ii). Although the statutory definitions for managerial and executive capacity are the same and the definitions of qualifying relationship/organization are similar, the question of overall eligibility requires a comprehensive review of all of the provisions, not just these definitions. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition,

which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d). The approval of an L-1A nonimmigrant petition does not guarantee that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Further, in the instant matter, it appears that the beneficiary's L-1A nonimmigrant petition was filed in October 2006, during a year in which the petitioner was presumably still operating multiple retail stores and generating substantial revenues. As noted above, the petitioner earned \$1.8 million in 2006 and paid wages in excess of \$500,000. As discussed above, the petitioner's circumstances changed significantly subsequent to the approval of the L-1A petition filed in 2006. Based on the lack of evidence of eligibility in the current record, the director was correct to depart from the prior nonimmigrant approval and to deny the immigrant petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.